BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2017-305-E

IN RE: Request of South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920	)	**SCE&G'S RESPONSE TO ORS'S BRIEF IN SUPPORT OF MOTION TO AMEND REQUEST**

Pursuant to 10 S.C. Code Ann. Regs. 103-829(A), South Carolina Electric & Gas Company ("SCE&G" or the "Company") submits this Response to the South Carolina Office of Regulatory Staff's ("ORS") Brief in Support of Motion to Amend Request of the South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920 ("Brief in Support of Motion to Amend").

INTRODUCTION

On September 26, 2017, ORS commenced the instant action by filing its Request for Rate Relief to SCE&G's Rates Pursuant to S.C. Code Ann. § 58-27-920 ("Request"). ORS explicitly based its Request upon the statutory authority granted to the Commission by S.C. Code Ann. § 58-27-920, which "allows the Commission to put into effect a schedule of rates as shall be deemed fair and reasonable by order no less than fifteen days **after a preliminary investigation by ORS and upon such evidence as the Commission deems sufficient**." Request at ¶9 (emphasis added).

However, as discussed in SCE&G's Brief in Support of its Motion To Dismiss filed on October 31, 2017 ("Brief in Support of Motion to Dismiss"), and its Response in Opposition to and Motion to Strike ORS's Motion to Amend Request ("Motion to Strike") filed on October 27,

2017, "ORS's Request is devoid of ***any*** of the statutorily-required information that can be used to justify such relief or to show that the Suspension would result in rates that are 'fair and reasonable,' as required by § 58-27-920, or 'just and reasonable' as required by § 58-27-810." Br. in Supp. of Mot. to Dismiss at 2. More specifically, "ORS has not presented any evidence that a 'preliminary investigation' has been conducted or that the proposed rates would be 'fair and reasonable' if adopted by the Commission." Br. in Supp. of Mot. to Dismiss at 5. *See also* Response at 1-2.

To the contrary, the Request, if granted, would deprive SCE&G of its right to earn a return on its $4.8 billion investment in the nuclear project and would arbitrarily force SCE&G to incur a write-down of approximately $2.9 billion against its common equity. Br. in Supp. of Mot. to Dismiss at 6; Aff. of Jimmy Addison at ¶¶25, 28. As a result, SCANA's short-term credit facilities, which are used to support the cash needs of daily operations, will go into default and SCANA and SCE&G will be forced to find replacement funding on an emergency basis, which likely would be expensive, if it is available at all. Br. in Supp. of Mot. to Dismiss at 6-7; Aff. of Jimmy Addison at ¶¶8, 30. Moreover, rating agencies would almost certainly downgrade the debt ratings for both SCANA and SCE&G, possibly pushing both companies below investment grade and effecting a dramatic rise in the companies' debt costs. Br. in Supp. of Mot. to Dismiss at 7; Aff. of Jimmy Addison at ¶¶15, 16, 30.

Notwithstanding the statutory deficiencies of its Request and the fact that any order granting the requested relief would be without evidentiary support, would be arbitrary and capricious, and would result in confiscation of the Company's property in violation of the United States and South Carolina Constitutions, ORS moved on October 17, 2017, to amend its Request "by adding to it the request that the Commission consider the most prudent manner by which SCE&G will enable its customers to realize the value of the monetized Toshiba Corporation

("Toshiba") guarantee payment and other payments made by Toshiba towards satisfactions of its obligations to SCE&G." Mot. to Amend at ¶2. As with the Request, ORS did not represent or demonstrate in its Motion to Amend that any preliminary investigation had been performed with respect to the content and structure of the Company's current schedule of rates and charges. Mot. to Strike at 3. ORS also presented no evidence showing the impact on SCE&G's financial integrity if the Toshiba payment ("Toshiba Payment") is applied in a manner different from how the Company currently accounts for such payment. *Id.* The Motion to Amend further failed to set forth a schedule of rates and charges that ORS represents would be "fair and reasonable" or "just and reasonable" if implemented by the Commission. *Id.*

ORS fails to address any of these issues in its Brief in Support of Motion to Amend. Instead, ORS attempts to evade the statutory requirements of S.C. Code Ann. § 58-27-920, upon which its Request and Motion to Amend are based, by asserting that the amendment sought by ORS is not barred by Rule 12(f) of the South Carolina Rules of Civil Procedure ("SCRCP") and should be permitted under Rule 15(a), SCRCP. ORS further misreads SCE&G's recent Form 10-Q to incorrectly suggest that the Toshiba Payment will not be utilized to benefit SCE&G's customers. As with the remaining unsubstantiated assertions advanced by ORS to support its motion, these assertions do not justify granting the requested amendment and do not merit the relief that ORS seeks.

ARGUMENT

I. The Motion to Amend should be denied and stricken in that the relief requested is not permitted by and exceeds the Commission's authority granted by S.C. Code Ann. § 58-27-920.

In bringing this action, ORS has attempted to invoke the Commission's jurisdiction under the authority granted to it by the General Assembly pursuant to S.C. Code Ann. § 58-27-920 ("The

commission may, after a preliminary investigation by the Office of Regulatory Staff and upon such evidence as to the commission seems sufficient, order any electrical utility to put into effect a schedule of rates as shall be deemed fair and reasonable….”). As an administrative agency, however, the Commission “has only the powers conferred on it by law and must act within the authority created for that purpose.” *SGM–Moonglo, Inc. v. S.C. Dep’t of Revenue*, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008) (citing *Bazzle v. Huff*, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995)). *See also FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 125 (2000) (“Regardless of how serious the problem an administrative agency seeks to address, ... it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’”) (*quoting ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). To pursue a cause of action under S.C. Code Ann. § 58-27-920, ORS therefore must satisfy the procedural requirements set forth in the statute in order for the Commission to have authority to act. As explained below, ORS has utterly failed to shoulder this burden.

As discussed by SCE&G in its Motion to Strike, the Request “violates the terms of S.C. Code Ann. § 58-27-920 in that it sets forth no evidence of a preliminary investigation, is based on unsupported allegations which are not evidence, and, if granted, would result in insufficient, unjust, unreasonable, and confiscatory rates without any factual basis for finding that the rates are ‘fair and reasonable’ or ‘just and reasonable.’” Mot. to Strike at 2. ORS does not dispute or even counter the Company’s position, and does not present any other allegations demonstrating it has satisfied the requirements of S.C. Code Ann. § 58-27-920. Accordingly, ORS has failed to make the necessary prerequisite showing for the Commission to exercise its authority under S.C. Code Ann. § 58-27-920 and the Motion to Amend therefore should be denied and stricken and the Request dismissed. *See Responsible Econ. Dev. v. S.C. Dep’t of Health & Envtl. Control*, 371 S.C.

547, 553, 641 S.E.2d 425, 428 (2007) ("Any action taken by [an administrative agency] outside of its statutory and regulatory authority is null and void.") (citations omitted).

ORS's reliance upon Rules 12(f) and 15(a), SCRCP, also is misplaced for several reasons. First, ORS states that the amendment sought does not satisfy any of the characteristics of Rule 12(f) and, therefore, should not be stricken. Br. in Supp. of Mot. to Amend at ¶23. To the contrary, the Motion to Amend is both immaterial and impertinent to this pleading in that the requested relief does not satisfy or conform to the requirements of S.C. Code Ann. § 58-27-920. *See* Black's Law Dictionary (10th ed. 2014) (defining "immaterial" to mean "tending to prove some fact that is not properly at issue; lacking any logical connection with the consequential facts"); Black's Law Dictionary (6th ed. 1990) (defining "impertinent" to mean "that which does not belong to a pleading … or other proceeding…. A term applied to matter not necessary to constitute the cause of action or ground of defense.").

Second, ORS relies upon Rule 15(a), SCRCP, presumably for the proposition that courts are encouraged to freely grant leave to amend. *See* Br. in Supp. of Mot. to Amend at ¶24 (*citing Patton v. Miller*, 420 S.C. 471, 804 S.E.2d 252 (2017). Notably, however, ORS ignores the *Patton* court's citation of the U.S. Supreme Court's decision in *Foman v. Davis*, 371 U.S. 178 (1962) in support of its decision. Although ORS correctly notes that, generally speaking, leave to amend should freely be given, *Foman* also limits a party's ability to amend a pleading only in those cases where "the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief." *Id.* at 182 (emphasis added). For this very reason, ORS's Motion to Amend should be denied and stricken because the threshold requirements of S.C. Code Ann. § 58-27-920 have not been satisfied and the relief requested is not a proper subject of relief due to ORS's failure to properly invoke the Commission's authority to act under this statute. Similarly, *Foman* recognizes

that "futility of amendment" can justify denial of a motion for leave to amend. *See also HCMF Corp. v. Allen*, 238 F.3d 273, 277 (4th Cir. 2001) (proposed amendment was futile where added claim was not legally cognizable). In order to seek relief under S.C. Code Ann. § 58-27-920, ORS must comply with the mandatory process of performing a preliminary investigation and present sufficient evidence regarding a schedule of rates that may be deemed fair and reasonable. However, neither the underlying Request nor the Motion to Amend satisfies these statutory requirements. ORS has performed no investigation that would provide the Commission with any evidence—much less sufficient evidence—that would allow it to determine whether the requested revised rates will be either "fair and reasonable" or confiscatory. Thus, the requested amendment is futile and both the Motion to Amend and the underlying Request are defective and should be denied and dismissed on the basis that they are clearly deficient. *See Katyle v. Penn Nat. Gaming, Inc*., 637 F.3d 462, 471 (4th Cir. 2011) ("Futility is apparent if the proposed amended complaint fails to state a claim under the applicable rules and accompanying standards: '[A] district court may deny leave if amending the complaint would be futile—that is, if the proposed amended complaint fails to satisfy the requirements of the federal rules.'") (*quoting United States ex rel. Wilson v. Kellogg Brown & Root, Inc.,* 525 F.3d 370, 376 (4th Cir. 2008)); *Anand v. Ocwen Loan Servicing, LLC*, 754 F.3d 195, 200 (4th Cir. 2014) ("While leave to amend should be freely given, it '[may] be denied on the ground of futility when the proposed amendment is clearly insufficient or frivolous on its face.'") (*quoting Johnson v. Oroweat Foods Co.,* 785 F.2d 503, 510 (4th Cir. 1986)).

In sum, permitting ORS to amend its pleading and seek relief that does not comply with the underlying statutory conditions upon which ORS's request is based would result in a proceeding that has not been authorized by law and, therefore, would constitute an impermissible *ultra vires* act by the Commission. *See also* S.C. Const. art. I, § 23.

II. ORS misreads SCE&G's Form 10-Q to support its Request.

ORS also cites to SCE&G's Form 10-Q filed on November 3, 2017, with the Securities and Exchange Commission in support of its Motion to Amend. Br. in Supp. of Mot. to Amend at ¶¶20-21. Specifically, ORS asserts that SCE&G's statement in Note 4 on page 25 of the Form 10-Q—representing that portions of the Toshiba Payments have been utilized to repay maturing commercial paper balances—contradicts prior statements that the proceeds will be utilized to benefit SCE&G's customers in a manner to be determined by the Commission. Br. in Supp. of Mot. to Amend at ¶21. As an initial matter, the Company respectfully and adamantly disagrees with ORS's suggestion that it has improperly used the Toshiba Payment or that these funds have not benefitted SCE&G's customers. To the contrary, and as explained in the Form 10-Q, "[p]ortions of the proceeds received … have been utilized to repay maturing commercial paper balances, which short-term borrowings had been incurred for the construction of the New Units prior to the decision to stop their construction." SCE&G submits that it is appropriate to use the funds in this manner and that fulfilling its maturing short-term debt obligations directly benefits its customers.

More importantly, however, ORS omits the very next sentence of the Form 10-Q, which states that, "[s]hould the [Commission] or a court direct that these proceeds be refunded to customers in the near-term, or direct that such funds be escrowed or otherwise made unavailable to SCE&G, it is anticipated that SCE&G would reissue commercial paper or draw on its credit facilities to fund such requirement." SCE&G therefore has consistently represented and affirmed that the funds derived from the Toshiba Payment will be applied as may be directed by the Commission or a court of competent jurisdiction and will go to the benefit of the customers.

SCE&G has done nothing contrary to that commitment. Having received cash by monetizing the Toshiba Payments, SCE&G was required to do something with that cash. It would have been poor cash management practice and contrary to customers' interests for SCE&G to leave this cash in a bank account while continuing to pay interest on short-term notes it could otherwise repay. SCE&G used the cash received from the Toshiba Payments to pay off short-term notes as they came due. There is nothing unusual about this. SCE&G issues short-term notes in the ordinary course of operating its business. It repays or refinances them as they come due and can issue additional short-term notes when future cash needs arise.

As a regulatory accounting and rate making matter, the value of the Toshiba Payments has been recorded as a regulatory liability which preserves the benefit of the Toshiba Payments for future allocation to customers. The fact that the associated cash was used to reduce short-term debt and the interest expense associated with it does not limit how the payments can be treated in the future for regulatory accounting and rate making purposes.

ORS's argument confuses cash management practices with regulatory accounting practices. SCE&G is preserving the value of the Toshiba Payment in the form of a regulatory liability for future allocation. In the interim, customers have received the benefit of the Toshiba Payments through reductions in short-term interest expenses for SCE&G's regulated businesses. In regards to these matters, SCE&G has done nothing inconsistent with its commitment that customers will receive the full benefit of the Toshiba Payment.

Accordingly, ORS's erroneous assertions that are based on a misreading of SCE&G's Form 10-Q provide no support for its Motion to Amend, and provides further support that ORS's Motion to Amend should be denied or stricken.

CONCLUSION

For the reasons stated above and in its Motion to Strike, SCE&G respectfully requests that the Commission reject or otherwise strike the Motion to Amend and grant such other and further relief as is just and proper.

Respectfully submitted,

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